be established in States where the questions have not been decided. Of course the courts whose attitude like that of New York has been consistently opposed to yielding recognition to foreign divorces will follow their previous decisions. F. L. S.

LIABILITY OF WATER COMPANIES FOR FIRE LOSSES.—In two recent articles published in this Review, the question of the liability of water companies for fire losses was somewhat exhaustively discussed. The majority of the actions wherein it has been sought to hold water companies liable for fire losses suffered by private property owners, have been brought for breach of contract. In a few cases the theory adopted was that the water company owed a duty to all property owners, by reason of the public character of its service; and the fact that it was under contract with the city to furnish an adequate water supply and pressure for fire protection, did not relieve it from liability in tort for any loss suffered by an inhabitant of the city through insufficient service. The Supreme Courts of Indiana, in *Fitch* v. *Seymour Water Co.*, 139 Ind. 214, Georgia, in *Fowler* v. *Athens City Water Works Co.*, 83 Ga. 219, and Mississippi, in *Wilkinson* v. *Light, Heat and Water Co.*, 78 Miss. 389, have repudiated this doctrine of liability in tort, though the Supreme Court of North Carolina, a most able and progressive court, has affirmed it, in *Fisher* v. *Greensboro Water Supply Co.*, 128 N. C. 375.

In a somewhat curious way, which it is not material to discuss here, the question of the validity of the judgment in the *Fisher case* got into the federal courts, and the United States Circuit Court, in *Guardian Trust & Deposit Co.* v. *Fisher*, 115 Fed. 184, made an independent examination of the grounds for the North Carolina judgment, holding that an action in tort would lie. This case was carried to the Supreme Court of the United States, and that tribunal has sustained the Circuit Court. *Guardian Trust & Deposit Co.* v. *Fisher*, 26 Sup. Ct. Rep. 186.

MR. JUSTICE BREWER, rendering the opinion of the court, said: "We are met with the contention that, independently of contract, there is no duty on the part of the water company to furnish an adequate supply of water; that the city owes no such duty to the citizen, and that contracting with a company to supply water imposes upon the company no higher duty than the city itself owed, and confers upon the citizen no greater right against the company than it had against the city; that the matter is solely one of contract between the city and the company, for any breach of which the only right of action is one *ex contractu* on the part of the city. It is true that a company, contracting with a city to construct water works and supply water may fail to commence performance. Its contractual obligations are then with the city only, which may recover damages, but merely for breach of contract. There would be no tort, no negligence, in the total failure of the company. It may also be true that no citizen is a party to such a contract, and has no contractual or other right to recover for the failure of the company to act; but, if the company proceeds under its contract, constructs and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites the cit-

izens, and if they avail themselves of its conveniences, and omit making other and personal arrangements for a supply of water, then the company owes a duty to them in the discharge of its public calling, and a neglect by it in the discharge of the obligations imposed by its charter, or by contract with the city, may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, is not one for breach of contract, but for negligence in the discharge of such duty to the public, and is an action for a tort."

This decision is an important and far-reaching one, and may mark the beginning of a general movement among the courts to recognize the tort liability of water companies for fire losses due to insufficient water supply.

E. R. S.

DIVERSION OF SUBTERRANEAN PERCOLATING WATERS.—That the qualification lately given to the law respecting the extent of the owner's right to divert subterranean waters percolating through his land is being widely accepted in this country is indicated by a clear opinion rendered in the recent case of *Pence et al.* v. *Carney et al.*, Nov., 1905, — W. Va. —, 52 S. E. Rep. 702. In this case the plaintiffs were owners of land on which was a spring of valuable mineral water, and an expensive hotel frequented for the purpose of enjoying its medicinal and curative effects. Defendants owned adjoining land and, seeking to compete with plaintiffs, sunk a well and obtained a like water. The operation of a large steam pump, placed in defendants' well resulted in a complete cessation of the flow on plaintiffs' premises. On appeal from the action of the circuit court in sustaining the demurrer to plaintiffs' bill for an injunction, it was held that all subterranean waters are presumed to be percolating waters and that the owner of land who explores for, and produces subterranean water within the boundary of his land, is limited to a reasonable and beneficial use of such water, when to otherwise use it would result in the depletion of the water supply of the neighboring or adjoining land.

Underground waters are presumed to be percolating waters until it is shown that they exist in a known and well defined channel. *Taylor* v. *Welch* (1876), 6 Ore. 198; *Ocean Grove Ass'n* v. *Com'rs of Asbury Park* (1885), 40 N. J. Eq. 447, 450, 3 Atl. Rep. 168. And they are not recognized as flowing in such channels unless known to so exist, or their existence is ascertainable from surface indications or other means, without sub-surface excavations for that purpose. *Taylor* v. *Welch,* supra; *Lybe's Appeal* (1884), 106 Pa. St. 626, 634, 51 Am. Rep. 542; *Black* v. *Billymena Comm'rs* (1886), 17 Ir. L. R. 459, 474. Applying these rules, the court held the waters in controversy to be percolating waters. Having thus established their nature, the Supreme Court of West Virginia adopted the common law rule as qualified in the last few years by many well reasoned cases. The court indicates that it is a rule not peculiar to any jurisdiction but one that is applicable to all. The earlier American and the present English rule is that the owner of the soil may use percolating waters at pleasure, although in so doing he may drain or entirely divert such waters from the lands of adjacent or neighboring owners to